No. 316, 317, 318

Brief for Defendant in Error

The Supreme Court U. S.
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JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

Filed Dec. 10, 1898.

JOHN S. WILLIS,

No. 16901. vs.

THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

ROBERT WRIGHT,

No. 16902. vs. 317

THE SAME.

MICHAEL S. VOUGHT,

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BRIEF FOR DEFENDANT IN ERROR.

C. H. GROSVENOR,
Of Counsel for Defendant in Error.

COLUMBUS:
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BRIEF FOR DEFENDANT IN ERROR.

MOTION TO DISMISS THE PETITION IN ERROR TO REVERSE THE SUPREME COURT OF THE STATE OF OHIO.

This is a motion to dismiss a petition in error to reverse the Supreme Court of Ohio in the four several actions named in the caption of this brief, and this argument is offered in support of said motion.

It is, probably, proper to say, in this connection, that this is a contest between The Columbus, Hocking Valley & Athens Railroad Company, a corporation duly organized under the laws of the State of Ohio, and organized to build

a railroad line from Athens to Columbus, paralleling The Columbus, Hocking Valley & Toledo Railroad Company's line, and the latter Company. This is the real controversy. The people of Ohio, the owners of the public works of Ohio, have never authorized any of this litigation; it is simply and solely a contest between these two rival lines. The filing of this petition in error and the writ of *supersedeas* thereunder could have, in my judgment, but one effect, and that would be to delay and hinder the construction of the defendant's railroad line and perpetuate, to that extent, the monopoly of The Columbus, Hocking Valley & Toledo Railroad Company. This litigation has been long drawn out, and the real party in interest has never made his appearance by name in the Courts, but this has not misled anyone, and everybody understands who the real parties to the contest are. This will not militate against the allowance of this motion, if there is a substantial ground to permit the motion to be filed, but I do not hesitate to submit to the Court that the reasons here assigned do justify a careful examination of this question to the end that needless expenses and dilatory litigation may be avoided.

From the arguments made heretofore in the several Courts, in which these cases have made their appearance, it is easy to understand precisely what the questions sought to be made in this Court are, and in order that the motion may prevail it must appear to the satisfaction of the Judge, before whom the motion is heard, that there is no federal question involved here; no question in which the United States is interested, or, in the adjudication of which, it is competent to invoke the interference of the United States, or, that there is no right here guaranteed by the Constitution of the United States or the laws thereof, that the plain-

tiffs in error may invoke for their benefit. It is said that there are two federal questions here. The first is, that the abandonment of this canal is a violation of the contract between the federal government and the State of Ohio, by which certain aid was given by the federal government to the construction of the Ohio canal system; and,

Second, That the act in question violates Section X of Article I, of the Constitution of the United States, which ordains, that no State shall pass any bill impairing the obligation of contracts, and under this second head might be all the objections which can be asserted by the plaintiffs in error.

The plaintiff in this case must stand upon one of the two following grounds: Either, first, he must come here by virtue of his relation to the record and by virtue of the condition of the record, or, secondly, he must come here because he has a right, by assignment or by substitution or subrogation, to the rights of somebody else. The United States was never a party to this litigation, and I may state here, with full knowledge of the precise facts, that the Attorney General of the United States was repeatedly appealed to, by counsel for the railroad company, to intervene in the minor Court and ask that the United States be made a party and that litigation might proceed, but the Attorney General, very properly, refused to have anything to do with it. So, let us see what ground is there and what semblance of right is there to claim that Shotwell, (I will take him as the figure-head of the transaction) may invoke some interest of the United States in this subject matter and have those rights subjugated to his interest? Suppose a fruit vender has obtained a lease from the United States to occupy a place in one of the public buildings at Washington to vend his wares for all time, and then the United States sells the property to

somebody else, can this vender of fruit invoke the aid of the United States Government to uphold his lease? This is not wholly pertinent and not altogether "on all fours," but I maintain that it is absolutely too late; that the rights of the United States in these canals, whatever they may be, and I do not care very much what, are to be cared for, and handled, and abandoned and forfeited and sold by the State of Ohio, upon its own motion and in its own way, and until the United States becomes a party to some litigation growing out of them, no intervener, having had some sort of interest of somebody else, can invoke the aid of the United States to prosecute, in their behalf, an action of this character. So it is claimed, on behalf of the defendant, that the record is fatal to the claim of the plaintiff in that he seeks to be benefited by a right that he had under some legislation of the United States, which the United States refuses to insist upon. So much for my first proposition.

This case was tried in the Supreme Court of Ohio, and the Supreme Court rendered a decision, under six heads, and settled every question that can possibly be made here, and the only question that can be made here is, whether the Supreme Court of Ohio erred as to the questions involved in the proposition of the plaintiffs here.

From time immemorial the Supreme Court of Ohio has held just what this case decided, as follows:

"Contracts made with the Board of Public Works or other agents of the State, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the State, and no action will lie against the State for damages resulting from such abandonment."

Questions of the right of the lessees of the water of the canal have been heard and determined in the Supreme

Court of Ohio for so many years that no one disputes the authority of those decisions now in this State. The general result of the whole of it is that by the act of 1825, under which this canal was constructed, the State of Ohio took a fee simple title to this land, and it is said that they have leased certain water rights and violated the terms of their contracts, and if that be so, the plaintiffs in this case have a right to sue the State of Ohio for damages, but that they have a right of that character has been negatived in the numerous cases cited by the Supreme Court.

In the decision now under consideration the result of the entire litigation in the State of Ohio is as follows:

First—That the canals were constructed for the purpose of navigation, and that alone;

Second—That the only power that the Board of Public Works had to lease water rights or make any stipulations in regard to the use of the canals, was a right incidental to and subject to the major proposition in the first paragraph here;

Third—That the State had a right by legislation to abandon any part or all of the canal system of the State;

Fourth—That upon such abandonment the leases of water rights, whatever they may have been, and the limitations upon the use of the canals all terminated because of their incidental character, and that the owners of such rights or their assigns had no right whatever against the State or anybody else.

That is the result of these decisions, and so, acting under the force of these opinions, in the act of the State of Ohio abandoning the Muskingum River Improvement, which was a part of the canal system, and in the act of Congress accepting the gift and dedication to the use of the government of the Muskingum River Improvement, care was taken

to reserve, by grant of Congress, the existing water rights along the Muskingum River. This was done as a matter of grace and with the full knowledge and understanding of Congress that unless such a provision was put into the law, the water rights would fall valueless and non-enforcible. The propositions here stated are fully sustained in the cases of—

State ex rel v. *Railway Co.*, 53 O. S. R., 189, 243;
State of Ohio v. *Snook et al.*, 53 O. S. R., 121;
Malone v. *Toledo*, 34 O. S. R., 541;
Hubbard v. *Toledo*, 21 O. S. R., 379; and
Fox v. *Cincinnati*, 33 O. S. R., 492.

In the latter case the Supreme Court of the United States has settled the only real question in this case, in my opinion. In *Fox* v. *Cincinnati*, 104 U. S., 783, Chief Justice WAITE in delivering the opinion, said:

"The right to abandon follows necessarily from the right to build," and again, "Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the State to discontinue these canals and stop his supply of water."

The other cases cited are all predicated upon the fourth branch of the syllabus of *Hubbard* v. *Toledo*, 21 O. S. R., 379, where the Court uses this language:

The abandonment of her public canals by the State creates no liability on her part to respond in damages resulting therefrom to parties holding leases of surplus water."

In *Malone* v. *Toledo*, 28 O. S. R., 643, the Supreme Court lays down the law in the syllabus as follows:

1st. "The State having, by its proper agencies, appropriated property in fee for the public uses of canals, it is within the power of the Legislature to authorize a change from one public use to another of a like kind."

2d. "The State, by its Canal Commissioners, having appropriated property in fee for the purposes of a canal, it was competent for the Legislature to devote such property to the uses of a public highway, such as the street of a city, without working a reversion in favor of the owner of the soil."

And it is for the Supreme Court of the State of Ohio to say what construction shall be put upon her own statutes and the operation of her own constitution. So, this Court has already decided this question and I will not pursue it further. The result of all these decisions by the State and United States Courts is, that neither one of the parties to this record have any rights at all. They have not the shadow of a right. They have not the suspicion of a right. They dealt with the State with their eyes wide open. They dealt with the State with a full knowledge of the power of the State in this behalf, and to now come and say that they have a right, not only to insist upon a remedy for themselves, but have a right to invoke the action of the United States of America to aid them in enforcing a right that does not exist, will not be, for a moment, contemplated.

Now, I come to the second proposition, that, under the act of Congress, granting to the State of Ohio certain aid in the construction of her canals, that there is an existing contract between the United States and the State of Ohio which cannot be abandoned by any act of the Legislature affecting the canals. In this connection it is proper to say that the act of the Legislature sought to be declared unconstitutional does not commit to a private corporation the use and ownership of this right of way. A railroad company is not a private corporation within the meaning of the grant of aid to the Ohio canal system. It is admitted by counsel for

plaintiff in error that the fair construction of the act of Congress was that the canal system of the State should "forever remain public highways for the use of the Government and all citizens." We might stop right here and say that this is a "public highway for the use of the Government and all citizens" within the meaning of that act, and that the whole thing complained of is simply a change of the character of the highway from a canal—and I may say a canal that has not had any water in it for ten years—to a railroad. That is all. Grant now that there is a binding obligation upon the State of Ohio to maintain the right of the United States to occupy this right of way with a public road, for the use of the government and the people, will anyone pretend to say that the transfer from a canal to a railroad is an abandonment that purpose? But we do not stand upon that ground alone.

Now, it is seriously claimed that there is a contract between the State of Ohio and the United States Government, which should have a construction by the Supreme Court of the United States, which will compel the State of Ohio to forever maintain the canal system of the State. More than half of it is to-day, practically, abandoned. There is not one-fourth of it that is in a navigable condition. Miles upon miles of it have been handed over to adjoining land-owners, and all sorts of re-occupation and re-dedication have been made, and now it is claimed that every man along the line of these abandoned canals, running up into hundreds of miles, may come into the courts of the country and invoke the participation of the United States Government, as a party, to force the State of Ohio to rehabilitate and rebuild these canals. By this construction, the United States was guilty of a breach of contract, that every citizen has a right

to insist upon, when they accepted the transfer of the Muskingum River improvement to the General Government, and if there was a contract by which the State of Ohio was to maintain and work in perpetuity that improvement, its transfer to the United States was a plain abandonment and violation of contract.

I.

It is difficult to treat with becoming seriousness an argument which insists that the United States Government, because it aided in the construction of a canal or canals in the State of Ohio nearly three-quarters of a century ago, has now the power to dictate the use or uses of such canal or canals. It is hard to bring one's mind to contemplate the full scope and ultimate result of such an argument. There never was a better case for the application of the argument *ad absurdum*.

If it be true that by accepting the aid of the Government the State of Ohio entered into a contract with the United States which to-day appears to make it unlawful and unconstitutional for the State to abandon, to lease, or to sell any portion of its public works thus aided by the General Government, then the incidents of a contract adhere and remain. If the Government did not acquire a beneficial interest in the contract, then its abandonment, by the State, works no hardship to the General Government or its interests. If it did acquire an interest in the property in the nature of a contract right to have the use and benefit of the property then all the incidents of ownership adhere.

Now, what are they? According to the argument the State of Ohio agreed that, in consideration of some aid by the General Government in the construction of its canal

system, the United States should forever have the right to transport its mails and passengers and arms, and munitions of war over and along these canals. What is involved in this contract? Why necessarily there is involved the duty of the State of Ohio to forever, during all time, to maintain in a navigable condition all of its canals, because if the United States has a right to protest against the abandonment of the canal, it has a like right to insist upon the property being kept as a canal. There is no escape from this argument and I suppose counsel on the other side will not attempt to escape, and I presume that he means to be understood as claiming that the United States has a proprietary interest in these canals, and as an instance thereof the State has contracted to maintain and keep in a navigable order for all time these water-ways.

HOW HAVE THE PARTIES TO THIS PRETENDED CONTRACT TREATED THE SUBJECT MATTER THEREOF?

For more than twenty years the State of Ohio has been abandoning portions of its canal system, and it will be presumed, and conclusively presumed by the Court that the United States Government has had full knowledge of that fact. It has not been done in the dark. Great factories are standing on canal land, by authority of the acts of the Ohio Legislature in the matters of abandonment. The hum of machinery and the roar of industry has taken the place of the croaking of the bullfrog, and the swish of the old time canal boat.

In 1870 the Ohio Legislature abandoned a portion of the Hocking Canal. In 1875 it abandoned fourteen miles more, and to-day, by the authority of the State of Ohio, the Columbus, Hocking Valley and Toledo Railway, *the putative*

client of the able counsel on the other side of this case, is operating its railroad where heretofore the canal lay. All over the State, without going into particulars, the same thing has been done—at Cleveland, at Akron and at other points.

Not only so, but the State of Ohio has abandoned the Muskingum Improvement and the General Government had full knowledge of it, for it accepted the cession of it to the General Government by the act of Congress itself.

Everywhere along the Ohio Canal from Cleveland to Portsmouth, the State of Ohio, for twenty-five years, has been granting rights equivalent to vacations of property of the canal, or its berme bank, to other parties. The same is true in the City of Columbus. Permanent rights have grown up, under acts of the Legislature, inconsistent with a property right of the Government of the United States and yet not one word of protest has ever been made by the United States Government and it does not protest now.

What then is our position? It is this. If there is in the judicial mind a question as to what the effect of the original arrangement was the parties to the alleged contract have placed their own construction upon it, and that construction is this:

"The State of Ohio desires to build certain canals. The General Government is willing to aid the State. The General Government, however, will require that so long as the canals, thus to be aided, are maintained as canals by the State that the General Government shall have the right to transport its mails, its troops, and its munitions, free of charge, over the lines of the canals."

But when the State of Ohio ceases to use it as a canal there is no right in the General Government to insist that it shall be maintained. I maintain and insist that if the General Government has, by the operation of this pretended

contract, such an interest as will allow it to interfere in this action, then it has a right by mandatory process to compel the State of Ohio to maintain its waterways and keep them in navigable order, or else it has a right to sue and recover damages for the breach of this contract. That is the position into which our friends are inevitably driven. A contract which is of such a character that it can be set up in bar of the constitutionality of an act of the Legislature is one, the specific performance of which can be demanded in a Court of Justice if there is no adequate remedy in case of abandonment. It would be a beautiful condition of things, a splendid result, if in this year of grace it should be decided by this Court that the United States of America can come into the Courts of Ohio, and either recover damages for the unlawful abandonment of the canals, or else compel the State of Ohio to go on through all time to come maintaining the obsolete waterways.

This arrangement between the parties must be considered in the light of the conditions in which we live. We are living in the nineteenth century, and this contract was made in the light of the nineteenth century, if it is a contract, and it was made in the light of the progress of the State of Ohio, of the nation, and of the world.

By force of that progress the lines of the canals in Ohio have been gridironed with railroads, and to say that the State of Ohio shall not be permitted to promote this great engine of civilization, this mighty force of progress, by the abandonment of its lines of waterways, is to hold that the contracts of the arrangements for the development of our State were made in such a way as to forever bar growth and to hinder progress.

The State of Ohio received aid from the General Government in the construction of its State roads, and hundreds

of miles of road in Ohio were built, in part, with the money furnished by the Government, and the identical terms are used in those instances as in these canal grants. The Government was not to be assessed any toll, and was always to have the free right-of-way upon them. The State and its authorities have, in portions of the State, abandoned hundreds of miles of these roads, re-established them upon other lines, and the Government has sat by and has never interfered.

Thus the parties to this arrangement have put their own construction upon it, and at the end of twenty odd years of operation under this construction it is too late now for the Government itself to set up any such claim as is here presented.

ANOTHER VIEW.

But the arrangement was not in the nature of giving to the United States a right of ownership in the property. It was simply a stipulation, an agreement, that it might forever transport its property upon these lines of canals free. It was an agreement, if you please, if it was enforceable at all, which is enforceable in a Court in an action for damages. The State of Ohio said, in consideration of the aid rendered, you can transport your property free over these canals. When the General Government presents its mails, its troops, its property for transportation, and is refused, then, and not until then, will there be even a breach of the contract, as between these parties.

It is very strange that the United States Government should be permitted here, by proxy, and by unauthorized proxy, and a proxy which is in fact a fraud upon the United States Government, to come into Court and object to the abandonment of one of the State's canals when there is no

averment or pretense that there has been a breach of this contract.

But now it is said that the act is unconstitutional because it impairs the validity of a contract.

It is not important to discuss the question raised in the case at Fairfield County, growing out of the rights of a miller there, as I am not familiar with the allegations of the petition, and in as much as that case is not involved in this in so far as the immediate rights of the plaintiff are concerned.

In this case it is enough to say that the lease, or pretended lease of water by the Board of Public Works to the plaintiff, Shotwell, was a lease of the surplus water so long as the canal was in operation. Whatever the terms of the lease may be I care not. The lease stands charged with the law of the case, and our Supreme Court has so often held that it was beyond the power of the Board of Public Works to bind the State, except to lease the surplus water during the time when the canals are in active operation, that it is not necessary to reply further.

Shotwell's contract, then, is an illegal contract if it did not fail by its own terms when the canal was abandoned. If there is anything in that contract which attempts to go beyond the leasing of the surplus water of the canal while the canal was in operation that contract was void from the beginning, and Shotwell is charged with full knowledge of that fact. He cannot set up a want of knowledge for it is a matter of public notoriety and of public knowledge, made so by the law itself.

So far as Shotwell is concerned we have that lease. He has a contract which is illegal and void. He comes into Court and says "this act is unconstitutional, because it

impairs the validity of a contract," which is of itself illegal, and which he cannot enforce. Suppose the canal was not abandoned, and suppose the Board of Public Works should give notice to Mr. Shotwell that there was no longer surplus water, and that they will no longer continue to supply water. He has taken his lease with the probability of just such a thing happening, and he cannot be benefited, and yet it is claimed that this same man, without any rights whatever under his contract, may come into this Court and be heard to say that this statement is unconstitutional because it puts an end to his contract.

THE AUTHORITIES CITED BY COUNSEL ON THE OTHER SIDE.

I have most carefully examined the cases cited by learned counsel on the other side, in 6 Cranch, 3 Howard and 4 Wallace, and 93 U. S. Otto, and, with all due respect to the eminent gentleman, I maintain without qualification or hesitation, that there is not one single word, syllable, or sentence that sustains the position taken by the counsel on the other side. In other words, these authorities have not the slightest application to this case, and I beg Your Honor to read them in full.

The case in Cranch was a case where the State of Georgia sold certain land with a condition and limitation upon the character of the grant, and in a suit between the parties, Chief Justice MARSHALL held that the attempt of the Legislature to revoke a grant of land which it owned, or which it sold for cash, was a violation of the contract of the State, and who would doubt it?

But the other cases in Howard and Wallace are so palpably ineffectual, for the purpose claimed on the other side, that I am surprised that they should have been cited by learned counsel.

The Government of the United States has acquired the right-of-way and builded certain roads, with which we are all familiar. The roads led out from Washington and the East across the States of Pennsylvania, Virginia and Ohio. They were owned by the Government; they were not subsidized by the Government; they were owned by the Government. In so far as a political organization can be the owner of roads the United States owned these roads absolutely.

The Government had gotten out of the use of the roads. It had gotten tired, you might say, of keeping up the repairs and improvements, and it said to the States of Ohio and Pennsylvania, you may improve these roads and have the control of them, up to a certain extent, but you shall not charge people riding in the United States mail coaches, toll on the roads. Beyond that you may do just as you please. What was the effect? They did charge these people toll. The Government said, we own this property, it is our property, and you are only the lessee of it, as it were, and you have a right to it only under the limitations which we have prescribed and laid down. You must live up to your contract; if you do not you cannot have possession of the property. That is all there is of it, and I am amazed that they should be cited, and there is only one favorable thing to be considered in this connection, and that is that it indicates that there is no authority in the United States to sustain the position of the defense.

The United States Government had not surrendered up its title in that case. The United States Government had no title in this case. It never had any title; it was the canal property of the State of Ohio. It was the property of the State in absolute fee simple title, and the United States Government said to the State of Ohio, we will give you so much money to enable you to finish up these canals, and

when you have got them done, the single thing which we ask of you is that you shall not charge tolls upon our commodities; that they shall go free over your lines. That is all there is of it.

Then the parties to that transaction—call it a contract, if you will. It was a contract that the State of Ohio would never, while running the canals, charge the Government toll. That is true. Nobody will doubt that, but the contract was not a contract that was enforceable against the title of the property; it does not effect the title of the property; it was a mere stipulation, and I maintain my original position, and I challenge successful contradiction, that in order that this Court shall uphold the position of counsel on the other side, this Court must go to the absurd length of holding that the United States has such a proprietary interest in this property, of a contractorial character, that it can enforce in a Court of Equity this contract. If it can maintain its contract for the purpose of defeating the abandonment of the canal by the State, that very fact gives it power to compel the State to repair, rebuild, and continue to carry.

The very roads which counsel cites, and which were the subject matter of the litigation in Howard and Wallace, have been abandoned by the State of Ohio, and the State is not exercising authority over a single foot of any one of the roads, and the same is true in Pennsylvania and Virginia.

The Government stood by and acquiesced, and when the States failed to further carry out their agreements, the Government itself abandoned these roads as your Honor well knows.

The terms of the contract were insisted upon solely and simply while the property was being operated by the States, and no further consideration given to it as soon as the abandonment was decreed.

NOW, THE RECAPITULATION.

First—The act of Congress making a donation to aid in the building of the Ohio canals, and the acceptance by the State, bound the State only to carry, while the canals were in use as such, the property of the United States free of charge. Nothing can be added to that contract by inference or construction.

Second—The State is not bound to maintain the canals beyond the will of the State in that behalf, for the reasons, (*a.*), the contract does not so read; and (*b.*), the parties to the transaction have put their own construction upon it by repeated, open, and notorious acts.

Third—The plaintiff in this action, not being a party or privy to the agreement between the State and the General Government, cannot assert the rights of the General Government here, even though such rights exist.

Fourth—The General Government having stood by with full knowledge, conclusively presumed, of the various acts of abandonment by the State, it is estopped now to object, because it would be a fraud upon the persons having acquired rights under such acts, as well as upon the State itself, which has adopted the policy of abandonment, and exerted the right to abandon for a quarter of a century without protest from the General Government.

Fifth—The authorities cited by counsel for the plaintiff have no application to the case at bar, for the reasons heretofore stated.

Sixth—The age in which we live, progressive and aggressive, is abandoning canals where they are valueless and useless, and no owner of a sprinkling cart can be heard to dispute the right of the State to march forward.

C. H. GROSVENOR,
Of Counsel for Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

There are three cases pending against this defendant in error in this Court, brought by John J. Walsh, Robert Wright and Michael S. Vought, respectively. All of said actions seek to restrain the defendant in error from taking possession of the Hocking Canal and constructing thereon a railroad under authority of an act passed by the Legislature of Ohio, May 18th, 1894, entitled "An act to provide for the abandonment of the Hocking Canal for canal purposes, and for leasing the same to The Columbus, Hocking Valley & Athens Railroad Company."

These actions are all founded upon practically the same ground, to wit, the unconstitutionality of said act.

Walsh is the owner of lands on both sides of, and adjoining said canal property, and claims that the State has an easement in said canal property for canal purposes only, and has no right to grant to said railroad company the privilege of constructing thereon a railroad, which he claims would lay additional burdens on his lands.

Wright claims a contract with the State whereby the State is bound forever to maintain a dam across the Hocking River at a point above his grist mill near Logan, Ohio, so as to furnish a sufficient supply of water both for said canal and said grist mill. His petition discloses that the river at that point is the sole source of supply for both the canal and the grist mill, but it does not indicate how the abandonment of the canal could fail to increase the supply of water to the mill. He also claims that said railroad would of necessity cross several lanes and highways through his premises, and that he, being the owner of one thousand acres, would be greatly injured thereby.

Vought claims that the Hocking Canal skirts the north and east sides of his lands and serves to catch and carry away waters from the same, and that seventeen miles of drain tile laid upon his farm and emptying into said canal would be rendered worthless by said abandonment; and in substance asks that the canal may be maintained for the purpose of draining his farm. He does not claim to have any interest in the canal property, or that the same was ever a part of his premises.

In all three cases it is alleged that a compact was entered into between the United States Government and the State of Ohio, by an act of Congress, passed May 24th, 1828, by

which the United States granted to the State of Ohio 500,000 acres of land within the State for the purpose, and upon the condition in said act contained, that said lands should be sold and the proceeds applied to the construction and completion of the canals already commenced; and further providing, in section 5 thereof: "Provided, that said canals when completed *or used* shall be and forever remain public highways for the use of the government of the United States, free from any toll or charge whatever, for any property of the United States or persons in their service passing along the same;" which said cession of lands was accepted by an act of the General Assembly of Ohio passed December 22, 1828.

It is claimed in all three cases by the plaintiffs in error, that the abandonment of the Hocking Canal impaired the obligation of this alleged compact.

In the petitions of Walsh and Vought this alleged compact or agreement is the only contract mentioned. In the petition of Wright this compact is pleaded, and also a contract between the former owners of his land and the State, under the act of March 23, 1840, whereby it is claimed the State agreed forever to maintain a mill dam above his grist mill for the purpose of supplying water to said canal and to his mill.

CLAIMS.

First.—Said act of abandonment does not impair the obligation of any contract between the State and Nation, or between the State and Mr. Wright; the only contracts pleaded in these three cases.

Second.—The defendant in error denies that said alleged compact or agreement between the state and national gov-

ernments bound the former to maintain its canals forever for the purpose simply of furnishing free transportation to the latter for its property and persons in its service, but claims that it simply bound the State to grant the free use of said canals to the government so long as said canals should be used for canal purposes.

Third.—Defendant in error denies the power of the Board of Public Works to enter into a contract with the predecessors of Mr. Wright to forever maintain said mill dam.

Fourth.—Defendant in error denies that the petition of Mr. Wright alleges any violation of said contract by said act of abandonment.

ARGUMENT.

FIRST.

The said act of abandonment does not impair the obligation of any contract between the State and Nation, or between the State and Mr. Wright, the only contracts complained of in these three cases.

When the Federal Government conveyed to the State of Ohio 500,000 acres of land to be sold and the proceeds applied toward the construction of the canals of said state, and provided that "The said canals when completed *or used*, shall be and remain forever public highways for the use of the Government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service, passing along the same," the arrangement was solely between the State and National governments. It was not for the benefit of any one citizen as distinguished from the others. It was not provided that a

citizen along the line of the canal should be guaranteed the perpetual use of any accidental benefit that might arise to him by reason of his location. It is not claimed by anyone that the State can be compelled to maintain its canals. The Supreme Court of Ohio has repeatedly held that the State is not bound to maintain them for public uses. If it is not bound to maintain them for public uses, it cannot be bound to maintain them for private uses, and therefore it is not bound to maintain them to run grist mills. The object in making the canals is for public use, not private privilege, and when no longer maintained for the primary object, the private and accidental privilege must fall.

If any damage follows to Mr. Wright by reason of the fact that the State does not continue to maintain his mill dam, then he must seek redress in the ordinary way, but he cannot resume title to the land granted to the State for canal purposes by his predecessor in title. The fee to the land passed to the State, and is an executed grant with possession delivered. The State can grant and has granted the use of the land to the defendant company, and it takes the land as amply as the State had it, and the State having a fee simple title, the defendant took a ninety-nine year lease of that title.

The statute under which the State acquired title to the land granted by Mr. Wright's predecessor in title, provided only for the acquiring of a full fee simple title. No lesser title could be or was acquired. The title could not be conditioned upon the maintenance of the dam. It could not be a conditional title. The petition does not allege that it was a conditional title, and if it did so allege it could have no effect because no other than a fee simple title could have been taken. The statute under which the title was acquired did not authorize the agents of the State to take any condi-

tional title, and any provisions outside of their authority, such as providing to forever maintain a dam, or to forever furnish water to run a mill, was beyond their authority and absolutely void, and, therefore, no contract between the State and the mill owner to forever maintain the dam or the canal ever existed.

Such being the legal status of the parties, there cannot possibly be any impairment of the obligation of a contract between the State and Mr. Wright.

The reasoning of plaintiff's counsel seems to be that if the grant of lands by the National Government provided that the canals when completed or used were to remain forever public highways then he and his predecessors in title had the right to *presume* that the State would forever maintain the canals, and, therefore, he had a right to contract with the State to forever maintain his mill dam and supply water from the canal to run his mill.

The only object was to furnish means of transportation for the public benefit. There is nothing in the arrangement between the State and National Governments upon which to base a contract for private benefit. There is no privity of contract between these land owners and either the State or National Governments. The two governments are the only parties to the contract, and so long as they are satisfied with each other's conduct and observance of the terms of the arrangement, the plaintiffs cannot elect to be the guardians of the interests of either government. No right of any of these plaintiffs is guarded or considered in the arrangement. The only right that is guarded to any party is that when the canals are completed *or used* they shall be and forever remain public highways for the use of the government of the United States, free from

any toll or charge, for the property, and persons in its service, passing along the same. If the United States Government finds the method antiquated and has no use for it—desires the privilege no longer—then the proviso in the act is satisfied and has no force, and the State is absolved from whatever duty it owed. It is an established fact that the United States Government no longer uses these canals for the purposes mentioned in the proviso and has long ago discontinued such use. The object of the proviso is ended, and with it ended the effect of the proviso. No private person has any right to insist upon the continuance of a contract which the only parties to it have abandoned. If plaintiff based his contract for water power upon the maintenance of a mill dam upon the presumption or probability that the United States Government would always insist upon the canals being maintained, such presumption was no part of the contract, and the failure of his presumption throws no duty upon the State.

It must be further noticed that the proviso does not require the State to maintain these canals for any given time, but when they are "used" the privilege is in the Government to use them for the purposes mentioned. If they cease to be used, the United States Government cannot use them.

We therefore contend that no obligation of plaintiff's contract was impaired by the abandonment of this highway for canal purposes.

We have no difference with counsel for plaintiffs in error upon the decisions quoted in their brief as to the binding force of agreements between the National and State Governments, such as that in 3 Howard, 151. Those cases decide as to the effect of grants with a proviso and acceptance, as between the two governments—the parties to the

contract. In the case at bar neither of the two parties contracting are complaining. The complaint here comes from one who is complaining because the parties to the contract are satisfied, and his complaint is not for their benefit but solely for his own private benefit.

It is claimed that by constructing the railroad it will cut off and destroy access to different parts of Mr. Wright's lands lying on both sides of the canal, now had by means of cross roads. It is difficult to see why this should happen. The law provides how all crossings shall be maintained, and in this regard he has only the same right with all other citizens who use the public highways.

We have seen that Mr. Wright claims that his predecessors in title sold the ground over which the canal was built through his lands and allowed the appropriation of the waters of the Hocking River (Record, page 21) and the consideration to be claimed therefor was that the State agreed through its agents to enlarge and forever maintain the dam theretofore built across said river for the use of his mill, so as to afford an ample supply of water both for said canal and the mill. The land so sold passed into the possession of the State by fee title. The dam was enlarged. The State has complied with its contract, hence the consideration has been paid. When the State ceases to use the waters of the Hocking River for canal purposes, Mr. Wright has the total benefit of the dam with no diminution of the waters by use for the canal. The Canal Commissioners or Board of Public Works could not bind the State to maintain the dam after the State abandons the canals. Such power is not within the duties enjoined upon them. See

State ex rel., v. *Railway Co.*, 37 O. S., 174–175.

Mr. Wright nowhere directly alleges that the agents of the State agreed that water should be forever taken from the canal to run the mill. If, however, such agreement had been made it would not be binding on the State, because such agreement would likewise have been beyond the power of the State's agents.

"The right to surplus water and to lease the same for private uses, is an incident of the public use of the canal for purposes of navigation. The canals of the State were authorized, constructed and maintained for public purposes, and not to afford water power to be leased or sold, for private use. The latter use is subordinate, and the right to the same may be terminated whenever the State, in the exercise of its discretion, abandons or relinquishes the public use."

Elevator Co. v. *Cincinnati*, 30 O. S., 630, Syllabus.

"The obstruction of a navigable stream cannot be maintained to promote private interests. Hence, when the State abandoned the Manhattan Branch Canal, the aqueduct, a part thereof, spanning and obstructing Swan Creek, which is a navigable stream, became a common nuisance, to abate which any riparian proprietor injured thereby had the legal right to invoke judicial proceedings."

"The abandonment of her public canals by the State, creates no liability on her part, to respond in damages resulting therefrom to parties holding leases for 'surplus water,' under the act of March 23, 1840, 'To provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and the collection of tolls.'"

Hubbard v. *City of Toledo*, 21 O. S., 379, Syllabus.
Cooper v. *Williams*, 4 Ohio, 253.
Buckingham v. *Smith*, 10 Ohio, 288–297.

Hubbard v. *City of Toledo*, 21 O. S., 399.
Elevator Co. v. *Cincinnati*, 30 O. S., 630–646.
Fox v. *Cincinnati*, 33 O. S., 492; affirmed, 104 U. S., 783.
State ex rel. v. *Board of Public Works*, 42 O. S., 615.
Erkenbrecker v. *Cincinnati*, 2 C. S. C. R., 412.
Haldoman v. *Pa. R. R. Co.*, 50 Pa. St., 440–441.

Hence we arrive again at the conclusion that the State has fully performed everything that it is bound to perform arising out of its contract with Mr. Wright's predecessor, and that it owes no further duty to Mr. Wright, and the State owing no further duty, the grantee of the State owes no duty to Mr. Wright.

It follows that the plaintiffs have no part or interest in the arrangement between the United States Government and the State, and that no contract of plaintiffs is impaired by the transfer of the canal property to the defendant, and that the act of Congress making a donation to aid in building the Ohio canals, and the acceptance by the State, bound the State only to carry, while the canals were in use as such, the property of the United States free of charge. Nothing can be added to that contract by inference or construction.

The State is not bound to maintain the canals beyond the will of the State in that behalf, for the reasons (*a*) the contract does not so read; and (*b*) the parties to the transaction have put their own construction upon it by repeated, open and notorious acts.

The plaintiff in this action not being a party or privy to the agreement between the State and the General Government, cannot assert the rights of the General Government here, even though such rights exist.

The General Government having stood by with full knowledge conclusively presumed, of the various acts of abandonment by the State, it is estopped now to object, because it would be a fraud upon the persons having acquired rights under such acts, as well as upon the State itself, which has adopted the policy of abandonment, and exerted the right to abandon for a quarter of a century without protest from the General Government.

The age in which we live, progressive and aggressive, is abandoning canals where they are valueless and useless, and no owner of a mill dam can be heard to dispute the right of the State to march onward.

In *Fox* v. *Cincinnati*, 104 U. S., 783, Chief Justice WAITE, in delivering the opinion, said: "The right to abandon follows necessarily from the right to build," and again "Every lessee of power took with full notice of the reserved right of the State to discontinue these canals and stop his supply of water."

The subject of this case was the abandonment of the southern end of the Miami and Erie canal by the Legislature, and the granting of the same to the City of Cincinnati for a public highway for street and sewer purposes, by which plaintiff was deprived of water from said canal for power purposes at his mill, under a lease from the Board of Public Works. This case is on all fours with the case of Mr. Wright.

In a long line of decisions the Supreme Court of Ohio has repeatedly and uniformly held that the State has the power to abandon any portion of its canal system and to grant the same to a city for street purposes, and that the State has power to grant the use of the same to a railroad for railroad purposes, and that no right of action accrued to the

lessees of surplus water by reason of such abandonment. Let us review these cases briefly in their chronological order:

In *Hatch* v. *Railroad Company*, 18 O. S., 92, the Court held that the White Water Canal Company (a corporation created under a special act similar to that creating the Lancaster Lateral Canal Company, with the same powers and privileges), had the power to grant and convey its easement in the premises to a railroad company for railroad purposes. Hatch was the owner of land through which said White Water canal passed. He brought an action for damages upon the theory that the abandonment of the canal caused a reversion of the land to the owner of the fee, the plaintiff, and that he was entitled to the full value of the land thus appropriated and used by the railroad company for railroad purposes. The Court held, on the contrary, that the easement for railroad purposes was similar to that for canal purposes, as both were common carriers, and that the measure of damages was for any *additional* burden placed upon the land by reason of the change in the manner of transportation, and that he was not entitled to compensation for the value of the easement of the canal company.

In *Hubbard* v. *Toledo*, 21 O. S., 379, the Supreme Court of Ohio held, 1 Syl.: "The execution of a grant pursuant to the act of March 20th, 1864, 'To authorize the City of Toledo to enter and occupy a part of the Miami and Erie canal as a public highway, and for sewerage and water purposes,' was an abandonment by the State of that part of her public canals known as the Manhattan Branch."

4 Syl. "The abandonment of her public canals by the State creates no liability on her part to respond in damages resulting therefrom to parties holding leases for surplus

water, under the act of March 23, 1840, 'to provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and the collection of tolls.'"

This was an action brought by the plaintiff against Toledo to recover damages on the theory that by the act of abandonment the real estate had reverted to the owner of the fee. Judge WEST, in rendering the opinion of the Court, said:

"In view of the magnitude of the private interests which this opinion may effect, not only in its immediate consequence, but in the future history and disposition of the public canals, we have given to the questions arising upon this record, which it is deemed necessary to pass upon, the most careful consideration." Judgment was rendered in favor of the city.

In *Malone* v *Toledo*, 28 O. S., 643, the Court lays down the law in the Syllabi as follows:

1. Syl. "The State having, by its proper agencies, appropriated the property in fee for the public uses of the canals, it is within the power of the Legislature to authorize a change from one public use to another of a like kind."

2. Syl. "The State, by its Canal Commissoners, having appropriated property in fee for the purposes of a canal, it was competent for the Legislature to devote such property to the uses of a public highway, such as the street of a city without working a reversion in favor of the owner of the soil."

3. Syl. "The canal and street being both public highways, the uses of either are uses of a public nature and of a like kind; nor does the fact that water pipes and sewers are contemplated in the street make such use inconsistent with that to which it was formerly applied."

4. Syl. "Property was appropriated in fee by the State through its Canal Commissioners, for the purposes of a canal. Subsequent statutes gave the City of Toledo power to enter upon a portion of the appropriated premises and occupy the same 'as a public highway, and for the use of water pipes and sewerage purposes,' and also released to the city all right of the State in the premises in question. Under such legislation, one who claims to own a portion of the canal bed can not contest the right of the city, on the ground that the change of use authorized by the Legislature has terminated the public interest in the property."

This act was passed March 26, 1864, to abandon a portion of the Miami and Erie Canal and authorized the City of Toledo to enter upon and occupy the same as a highway and for sewerage and water purposes. The Court, in rendering its opinion, said:

"When real estate is so appropriated for one particular public purpose, the fact that it is, by legislative authority applied to another public purpose is not necessarily an abandonment, nor is it a forfeiture of the public interest. Instances are abundant in the legislation of the State where land has been taken for one purpose and used for another, without objection or complaint from anyone. Railroads cross highways, and no one has ever supposed that this was such an abandonment of the highway as that the soil reverted to the owner. So canals have been allowed to use portions of turnpikes. In the Chagrin Falls case, 2 O. S., 419, an ordinary road was converted into a plank road. And in Hatch's case a canal was converted into a railroad, but it was held that this did not work a reversion of the canal bed to the original proprietor. It is now every day's experience that streets are used by railroads. All these are instances

where public property was appropriated for one particular public use and afterwards, by legislative consent, applied to another of a like kind."

Malone v. *City of Toledo*, 28 O. S., 656.

In *Elevator Co.* v. *Cincinnati*, 30 O. S., 629, the Court held:

3. Syl. "The right to surplus water, and to lease the same for private uses is an incident of the public use of the canals for the purpose of navigation. The canals of the State were authorized, constructed and maintained for public purposes, and not to afford water power to be leased or sold for private use. The latter use is subordinate and the right to the same may be terminated whenever the State, in the exercise of its discretion, abandons or relinquishes the public use."

The plaintiff in this case complained of the abandonment of the lower end of the Miami and Erie canal, and its conversion into a public street, and the consequent loss of power for its elevator.

In *Fox* v. *Cincinnati*, 33 O. S., 492, the Supreme Court of Ohio held in favor of the city and the constitutionality of the act of abandonment and against the right of the defendant to recover damages by reason of loss of water power for his mill. This case was carried to the Supreme Court of the United States, to which decision we have above referred.

In *Fauger* v. *Board of Public Works*, 42 O. S., 607, the Supreme Court of Ohio held:

2. Syl. "The Board of Public Works is not authorized by said statute (March 23, 1840, 3 R. S., 417), to in any manner surrender, abridge, restrict or limit its power to resume at any time the surplus water leased or sold for hydraulic purposes," etc.

In *Canal Co.* v. *Commissioners*, 27 O. S., 14, the Court held that the act authorizing the canal company to abandon the canal was constitutional, and that the Commissioners had no right of action against said canal company to compel said company to pay for the repairs of certain bridges over said canal after its abandonment.

In *McComb* v. *Stewart*, 40 O. S., 647, the Court held that the right to use surplus water from the mill dam ceased and determined with the dissolution of the canal company and the abandonment of the canal.

For more than twenty years the State has been abandoning portions of its canal system without objection or protest on the part of the government. In 1870 the Legislature abandoned the lower end of the Hocking Canal, extending from Nelsonville to Athens, and The Columbus, Hocking Valley & Toledo Railroad occupied a large portion of said canal bed as its right of way, without any protest from any source. The State abandoned the Muskingum improvement with full knowledge on the part of the general government, who accepted the cession by act of Congress. There have been a large number of acts abandoning portions of said canal system.

In *State* v. *Snook*, 53 O. S., 521, the Court held:

1 Syl.: "Lands of which the State in any manner acquired possession, under the acts of February 4, 1825, (2 Chase 1472) and February 7, 1826, (24, O. L. 58) and used in the construction of its canals, became the property of the State in fee."

Judge SHAUCK in rendering the opinion said:

"The effect of the legislation looking to the establishment of the canal system of the State was that it acquired an unrestricted title in fee to all the lands of which it in

any manner took possession for the purposes of such construction." (53, O. S. 531.)

The defendant contends that the Hocking Canal was not included in the provisions of the act of Congress of 1828, donating the lands referred to in aid of the Ohio canals.

The State was then engaged in the construction of the Miami and Erie Canal between Toledo and Cincinnati, and the Ohio Canal between Cleveland and Portsmouth; and the Hocking Canal was not then contemplated. In 1826 the Lancaster Lateral Canal Company was incorporated and a branch built from the Ohio Canal to the city of Lancaster, a distance of twelve miles.

It was owned and operated by a private company until 1838 when the State purchased this canal and extended it to the village of Athens, and denominated it the "Hocking Canal." This land appropriated by Congress had been sold and the proceeds applied to the building of the two former canals before the Hocking Canal was constructed, and no portion of the money arising from the sale of said lands was actually applied in the construction of the Hocking Canal. These facts appear upon the statute books of the State and of Congress and were not admitted to be true by the demurrer.

But even assuming that the contract between the State and National Governments applied to the Hocking Canal, using the language of Judge PUGH, in the lower Court,

"What right have the plaintiffs to vex the defendant and use the public time of the Courts with their contention that the contract between the United States and the State of Ohio has been impaired by the Statute in question? They were not parties to it. The United States only can complain of the violation of the contract. There is no privity of

contract between the plaintiffs and the United States, nor was the contract made for their benefit."

"Justice MILLER said in *Grinnell* v. *Railroad*, 103 U. S., 744: "This plaintiff had no right to stir up a litigation which the parties interested did not desire to have started."

"In *Van Wick* v. *Knevals*, 106 U. S., 369, the Court said: "A third party cannot take upon himself to enforce conditions attached to a grant when the Government does not complain of their breach."

"And as to the contract with Wright's predecessor, it must be construed with reference to the law of the State then in force. That law entered into and became a part of the contract just as much as if it was there in express terms."

"The State is not bound by the acts of its agents unless it manifestly appears that they were acting within the scope of their authority, and individuals who deal with them must take notice of the nature and limitations of the authority conferred by law upon a person acting in an official capacity."

"The law then in force required the Board of Public Works to reserve the right to resume the use of the water. Laws of 1841, page 174."

And "The stipulation that the right to use the water for the mill should be perpetual did not and could not affect the right of abandonment."

"A creation of water power was no part of the conception to construct canals. It was only an incident. No licensee with his stipulation for the perpetual use of the waters of the canals to run a grist mill, can compel the State to keep up the canal for his benefit after all commercial reasons for its existence and maintenance have ceased to exist. One man, or several hundred men, cannot turn back the hand on the dial of time."

The Board of Public Works had, in fact, no power to contract with Wright's predecessor to forever maintain a dam. It cannot be found in any statute. This contract, therefore, created no obligation on the State.

It follows, therefore, that the lease by the State of Ohio to Mr. Wright's predecessor, of surplus water from the canal to be used for water power, is not a contract that can be enforced against the State, but is a mere incident to the conduct of the canals and must terminate whenever the State sees fit to abandon the canals, and that therefore the abandonment of the canals by the State does not impair the obligation of any contract the benefit of which moves to Mr. Wright.

We think it is further clear and manifest upon the record, that whatever agreement was made between the United States and the State of Ohio as to the maintenance of the canals and use thereof for the purpose of the United States Government is a matter entirely between the two contracting parties and creates no right in favor of any private individual to insist upon anything that might flow from said agreement, and that when the parties are satisfied to abandon the use of the canals (and of this there can be no question) there does not exist in any citizen any right to insist that the State shall longer maintain the canals and to predicate this insistence upon the rights of the United States Government. Hence, there is no impairment of contract under this phase of the cases.

The contention that the Canal Commissioners agreed to forever maintain a dam across the Hocking River for the uses of the canal and the mill of Mr. Wright, and that to abandon the canal would impair the contract in that behalf, is not well taken. There is nothing in the petition which

shows that the State will not perform any duty resting upon it as to the maintenance of the dam. The abandonment of the canal is not a declaration that the dam will not be maintained, if in fact it should be maintained by the State. There is no allegation of the petition that the State has made any threats in that regard. But, aside from all that, whether the States hould or should not maintain this mill dam, cannot hinder the State from abandoning its canal system, and transferr ing its lands to any other agency for the purposes of public uses.

A fee simple to this right of way was obtained by the State and there can therefore be no conditions attached to it, hence even though the State did not keep the dam in order, that fact could not work against the right of the State to transfer the land to which it had the title in fee. Therefore, there is in this matter no impairment of contract.

It appearing then that there is no impairment of contract in any of the matters complained of, and that neither the Constitution nor any Statute of the United States is called in question, and that the complainants have no rights under the so-called compact between the State and the United States, then it must follow that there is no federal question raised in any of these cases, and that therefore the petitions in error should be dismissed.

Respectfully submitted,

D. L. SLEEPER,

JOHN J. STODDART,

Of Counsel for Defendants in Error.

Nos. 316, 317 and 318.

SUPREME COURT OF THE UNITED STATES.

Brf. of Sleeper v. Grosvenor & Stoddart for D.

Filed May 12, 1899.

Office Supreme Court U.S.
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Clerk.

JOHN J. WALSH,

vs.

THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

ROBERT WRIGHT,

vs. No. 317.

THE SAME.

MICHAEL S. VOUGHT,

vs. No. 318.

THE SAME.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANTS IN ERROR.

D. L. SLEEPER,
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JOHN J. STODDART,
Counsel for Defendant in Error.

COLUMBUS:
PRESS OF SPAHR & GLENN,
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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANTS IN ERROR.

I.

We shall discuss briefly the proposition for which counsel for plaintiff in error contends, the discussion to apply to all the causes and then pass to a consideration of the special features of the Wright case, touching generally upon the questions involved in the other causes.

The proposition upon which learned counsel for plaintiff in error bases his argument is that the furnishing of funds to the State by the National Government

for use in building canals, and the proviso that "said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same," constitutes a contract whereby the State is compelled to maintain the canals until an agreement to abandon them is entered into by the two governments, and that therefore (because a citizen), the plaintiff in error has a right to demand that the canals be so maintained for his sole interest until the two governments solemnly dissolve the original agreement. We have re-stated counsel's proposition so that its true import may be more apparent.

The conclusion of counsel is a *non-sequitur* and does not follow from the premises. Only a party or privy to a contract can object to a breach by another party. Contracts are made only for the benefit of the persons within their terms. The only parties to this arrangement between the two governments are the United States Government and the State Government. They alone are interested in it. They alone can be heard to complain. If the United States Government does not object to the abandonment of the canals, but tacitly consents, then no one else can be heard. The plaintiff in error does not complain as an official of the National Government, nor on its behalf, nor that the alleged contract was made on his behalf, his petition shows that he is absolutely unknown in the arrangement between the parties, a volunteer without standing and nowhere within the scope or objects of the

alleged contract, he does not represent a party to it, hence is a stranger to the matters between the Governments, and it must follow that he has no right to complain, whatever the parties to the alleged contract may do as to the subject matter of their agreement, and it must further follow that the plaintiff in error has no basis for his claim that the State must maintain the canal for his private benefit.

The position that the sovereignties acted in this case as agents for the plaintiffs in error (p. 10 of plaintiff's brief), cannot apply in these cases.

The plaintiff does not claim that he is wronged by being deprived of the use of the canal as a public waterway over which to transport persons or merchandise, or that the abandonment injures him by reason of the fact that the canals are thus rendered useless as arteries for the transmission of property and persons, the only claim is that plaintiff in error loses the privilege of using water from the canal to run his mill. The negotiations between the two sovereignties dealt with the matter of providing canals for public use and for this solely. Not a word or syllable is found in the acts and resolutions of the two sovereignties or in the aforesaid proviso looking to securing, or providing for, any rights to any person whomsoever to have or gain private rights or privileges through the matters then dealt with. The whole negotiation dealt with matters entirely public utilities to which private parties had no relation, and not one provision of which secured to them a single right upon which to rely. The fact that a person had land along the canal gave him no right not common to every citizen of the State. He could

legally acquire no right superior to those of citizens miles away. All were equally interested as part of the general public, but no one more than another. The fortuitous benefit of being along the canal was one solely of location and accident, carrying with it no right whatever. It did not affect in the slightest degree the canal or the relative position of the two Governments in reference thereto, nor the fact that it was constructed for the benefit of the general public, not for the abutting land holders. The abutting owners did not secure a single right that is not common to all the citizens of Ohio. If each and every citizen of Ohio can enjoin the State from abandoning the canal for canal purposes, then plaintiff can. If not, then plaintiff cannot. His rights are measured by the same rule as theirs. No one would claim that the consent of every citizen is needed to authorize the State to cease using the canals as waterways until the two Governments have formally revoked their arrangements.

We submit that plaintiff's rights are only such as are common to all citizens of Ohio, that the general public has no interest in the continuance of the canals to furnish water power for owners of land abutting on the canals, and therefore the plaintiff has no vested right growing out of the alleged contract between the sovereignties.

Whatever may have been the contention of parties as to the grade or quality of title the State could convey to the defendant for that part of this canal included in the piece built by the Lancaster Lateral Canal Company and sold to the State, that contention was

settled and the rights of parties thereto finally adjudicated in the State Courts. The title to the easement was there confirmed in the defendant railroad company subject to payment by it to the owners in final reversion for the damage of all additional servitude thereby laid upon the land. The ownership of the easement passed from the State to the company. If the company thereby acquired a title that called for an additional expense, it alone can complain.

The matter lies between the State and its lessee for adjustment. Whatever the State had it conveyed. The Supreme Court of the State has defined the rights of the parties in that regard, has determined that defendant owns the easement for the use of its railroad and must pay whatever damage arises from the change of use. This is not a federal question and hence does not present a question for review in this Court.

II.

Passing from the consideration of brief of counsel for plaintiff in error to a further discussion of the principles involved in the cause, we note that:

The single question presented by the record is whether the statute passed by the Legislature of Ohio, May 18, 1894, (91 O. L., page 327), impairs the obligation of any contract to which the plaintiff in error is a party or a privy.

Upon the facts stated in the petition, such impairment of the obligation of contract could only arise in two ways:

First—If the donation of land by the National Government to the State Government for the purpose of

building canals, and its acceptance by the State amounted to a contract, and some obligation of that contract has been impaired by said Act of the Legislature, which impairment affects the right of the plaintiff in error involved in the subject matter of the contract.

Second—If said Act of the Legislature of Ohio impaired any prior Act conferring contract rights upon the plaintiff in error or his predecessors in title, by reason of the alleged contract of the State to maintain forever said mill dam over the Hocking River so as to afford sufficient supply of water for said grist mill.

FIRST.

Does the donation of land by the National Government to the State Government for the purpose of building canals, and its acceptance by the State amount to a contract, and has some obligation of that contract been impaired by said Act of the Legislature, which impairment affects the right of the plaintiff in error involved in the subject matter of the contract.

The record discloses that on the 24th day of May, 1828, the Congress of the United States passed an Act granting a quantity of land to the State of Ohio to aid in the construction of canals.

The 5th section is as follows: "Section 5. And be it further enacted that there be and hereby is granted to the State of Ohio 500,000 acres of land owned by the United States, within the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or may hereafter be, contracted by

said State in the construction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extension of canals now making; which land when selected shall be disposed of by the Legislature of Ohio for that purpose, and no other;

"Provided, the said canals when completed OR USED, shall be and forever remain, public highways, for the use of the Government of the United States, free from any toll or charge whatever for any property of the United States, or persons in their service, passing along the same;

"And provided, further, that said canals already commenced shall be completed in seven years from the approval of this Act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales shall not be affected by that failure."

It is further provided by the 7th section of said Act, that, "Said Act shall take effect provided the Legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions thereof; and unless such expression of assent be made, this Act shall be wholly inoperative."

U. S. Laws, 1st session, 20th Congress, p. 113.

On the 22d day of December, 1828, the Legislature of Ohio assented to the several provisions and conditions of said Act.

It will be noted that this provision of Congress does not cast upon the State of Ohio the duty or burden to forever maintain said canals. Nothing whatever is said as to the length of time the State shall maintain

them. The only right reserved by the National Government is that when the canals have been completed and ARE USED, they shall remain public highways for the use of the United States, free from toll or charge for property or persons in the service of the United States along the same. The State of Ohio has complied with this proviso and has kept them at the service of the United States Government during all the time that they have been in use. At that time canals were the best known methods of transporting persons and property. Since then the demands of business have been met by the ingenuity of the people, and along all the small and interior lines of canals the railway has taken the place of water-way, the vestibule train supplants the canal packet-boat, and the fast freight train conveys the freight once entrusted to the slow-going canal boat. This class of canals has passed into history. They do not belong to the present day. The United States Government would not consider for one moment the propriety of transporting its mails or its troops or supplies along such canals, where the same are paralled by railroads. There can never be a demand by the United States Government for any rights saved to it by the above mentioned proviso. The objects for which the canal water-way was constructed have been long since attained. The canals have done the duty for which they were created and they can no longer perform that duty as it is required to be performed in the present day. The object of their creation has been satisfied, and with that has gone the satisfaction of all the duties and obligations resting upon the State and in favor of the United

States, saved to the United States by means of the said proviso. There now remains no duty of the State in that regard, and no right which the United States claims. Both parties to the original contract, if it was a contract, are satisfied, and every term and provision and obligation of the grant and its acceptance has ceased to be operative.

To longer maintain the canals would be no benefit to the United States Government. That Government would not use them. These conditions could not have been foreseen in 1828 when the National Government lent its aid in their construction. The Sovereignties could not have foreseen that railways would supplant canals. Such conditions could not have been in the contemplation of the parties, and the State will not be held by the general words of the Act of Congress donating the aid.

Chicago, etc., Ry. Co. v. *Hoyt*, 149 U. S., 1–14.

The State of Ohio has for years been changing the use of its rights of way from water ways to railways, and the United States Government has not objected.

REVOCATION OF ALLEGED CONTRACT BETWEEN STATE AND NATION.

A review of the history of the Acts of abandonment of the various portions of the canal system of Ohio clearly demonstrates this proposition.

On March 24, 1863, the Legislature passed an Act abandoning the southern portion of the Miami and Erie Canal, now known as Eggleston Avenue, and granting the same to the City of Cincinnati for street purposes. This Act was sustained by the Supreme Court of Ohio in the case of *Fox* v. *Cincinnati*, 33 O. S., 492, which case was carried to the Supreme

Court of the United States, and the decision of the Supreme Court of the State was sustained by the decision of this Court as reported in 104 U. S., 783.

Again in *Elevator Co.* v. *Cincinnati*, 30 O. S., 629, the Supreme Court of the State sustained the validity of said Act of abandonment.

On March 26, 1864, the Legislature of the State passed an Act abandoning the northern end of the Miami and Erie Canal, and granting the same to the City of Toledo for highway purposes. This Act was reviewed and sustained by the Supreme Court of Ohio in the cases of—

Hubbard v. *Toledo*, 21 O. S., 379.
Malone v. *Toledo*, 28 O. S., 643.
Richards v. *Toledo*, 31 O. S., 506.

On April 13, 1868, the Legislature passed an Act abandoning the Walhonding Canal and authorizing its sale, and the same has been since sold and transferred to a railroad company for railroad purposes.

On January 31, 1871, an Act was passed supplemental to the Act of March 26, 1864, relating to the abandonment of the northern end of the Miami and Erie Canal.

On April 29, 1872, an Act was passed abandoning the northern end of the Ohio Canal and authorizing the City of Cleveland to occupy the same, and the same is now occupied by a railroad company.

On March 6, 1873, an Act was passed abandoning the southern end of the Hocking Canal, and authorizing its use for public purposes.

On April 11, 1876, an Act was passed abandoning a further portion of the Hocking Canal south of the village of Chauncey, a portion of which is now occupied

by The Columbus, Hocking Valley & Toledo Railroad Company.

On April 11, 1876, an Act was passed vacating a portion of the Ohio Canal.

On May 4, 1877, an act was passed abandoning another portion of the Hocking Canal below the village of Nelsonville.

On April 12, 1888, an Act was passed abandoning a portion of the Wabash and Erie Canal, and authorizing the sale of the same.

On March 3, 1891, an Act was passed abandoning the Wabash and Erie Canal in Paulding County, and transferring the same to the Commissioners of said County for road, ditch and public purposes.

All of these eleven Acts of abandonment remain in full force and effect, and in so far as the Courts of the State have been called upon to pass upon them, they have been universally sustained and the power of the Legislature to abandon any portion of her canal system has been universally upheld.

These Acts of abandonment cover a third of a century. In all that time no officer of the National Government has seen fit to question the authority of the State, or to oppose any of these Acts. In one instance the Supreme Court of the United States has upheld the authority of the Legislature to abandon her canals.

If the National Government had any rights under said alleged compact or agreement, it will be held to have waived such rights and abandoned said compact by acquiescence and silence.

All the rights reserved to the United States have become so manifestly valueless that there is no reason or cause for the United States Government to object to the change of use above indicated, but on the other

hand, there is every reason for the Government to encourage the building of railroads to take the place of the antiquated methods of transportation formerly furnished by the canals. Such change from water-way to railway is for the best interests of the nation. Since the parties to this arrangement are satisfied, and the United States is not objecting to this change of use, then no other persons can object.

Using the language of Mr. Justice MILLER in *Grinnell* v. *Railroad*, 103 U. S., 744: "These plaintiffs had no right to stir up a litigation which the parties interested did not desire to be started."

"A third party cannot take upon himself to enforce conditions attached to the grant when the Government does not complain of their breach." *Van Wyck* v. *Knevals*, 106 U. S., 369.

No right was saved by the proviso to any other person or power excepting to the United States. It is not saved for the benefit of the public, and especially there is nothing saved or reserved or declared for the benefit of private individuals. No other persons are privies to this arrangement except the United States and the State of Ohio.

When they are satisfied, it does not lie with any person to complain. Neither of the parties to the arrangement are complaining. The complaint here comes from one who complains because the parties to the contract are satisfied, and his complaint is not for their benefit, but solely for his own private benefit. No right is conferred upon the plaintiff or his predecessors in title to presume that the State would forever maintain the canals. If the plaintiff based his contract for water power or the maintenance of the mill dam upon the presumption of the probability that the

National Government would always insist upon the canals being maintained, such presumption was no part of the contract or arrangement between the State and the National Government, and the failure of plaintiff to realize on his presumption throws no duty upon the State.

We therefore respectfully submit that if the donation and acceptance by the State of the said lands for canal purposes cast upon the State of Ohio any duty as to the use of these canals, it was solely in favor of the United States Government and not in favor of any person, and that therefore the plaintiff in error had no rights thereunder, and therefore the record does not show that he has any cause for complaint by reason of the change of use of said canal right of way, based on the arrangement between the United States and the State of Ohio.

SECOND.

Does said Act of the Legislature of Ohio impair any prior Act conferring contract rights upon the plaintiff in error or his predecessors in title, by reason of the alleged contract of the State to maintain forever said mill dam over the Hocking River so as to afford sufficient supply of water for said grist mill.

I.

The only provision as to quantity or kind of title to be acquired through the statute under which the State acquired title to the land granted by Mr. Wright's predecessors in title, provided: "That the Canal Commissioners shall pay the damages so to be assessed and appraised, and the *fee simple* of the premises so appropriated *shall be vested in this State.*"

23 O. L., Page 57-58.

Ohio ex rel. v. *Railroad Co.*, 53 O. S., 139.

The State of Ohio v. *Snook*, 53 O. S., 521.

This statute provided for a full fee simple title and no lesser title could be or was acquired. The title could not be conditioned upon the maintenance of a dam nor a supply of water through the canal. It could not be a conditional title. The petition does not allege that it was a conditional title, and if it did so allege, it could have no effect, because no other than a fee simple title could have been taken. The statute under which the title was acquired did not authorize the agents of the State to take any conditional title, and any agreement outside of their authority, such as providing to forever maintain a dam, or to forever furnish water to run a mill, was *ultra vires* beyond their authority and absolutely void, therefore, no contract between the State and the mill owner to forever maintain a dam or canal ever existed.

The record discloses that Mr. Wright's mill was built and in operation before the canal was constructed (page 10); that it was on the bank of the Hocking River and received its water supply from the Hocking River (page 10); that the Hocking Canal entered the river some distance above the mill and used the river almost down to the said mill, and from that point down past the mill, the canal as constructed took its water from the river. The mill is situated between the canal and river (page 10). Thls shows that the mill was not cut off from the waters of the Hocking River, and that its use of those waters is in no way obstructed or impeded by the non-user of the canal for canal purposes, and the only result would be to leave all of the waters of the river for the use of the mill whereas when the canal was in operation, part of the waters of

the river were used for canal purposes. This canuot be an injury to Mr. Wright and cannot in any way hinder him from using the waters of the river. The record shows that he used both the waters of the river and the canal during the time the canal was in operation. (Page 10.) Hence he is not deprived of any water right which he originally had before the making of the canal, but on the other hand is restored to the full possession of all the water rights that he ever had, and in that regard, is placed in the same position that he was before the canal was built, hence no contract right as to water supply can possibly be impaired for this reason.

Mr. Wright nowhere alleges that the agents of the State agreed that water should be forever taken from the canal to run the mill. If, however, such agreement had been made it would not be binding upon the State, because such agreement would likewise have been beyond the power of the State's agents and not the kind of compensation authorized by the statute above quoted to be paid by the Canal Commissioners.

The Canal Commissioners were, by the said statute, only authorized to pay the damages so to be assessed. There was no authority to bind the State by a payment in the nature of a perpetual or other promise to maintain a dam. They could not pay such a consideration. No such damage was authorized by the Act to be assessed against the State. Damages were not so measured nor paid. The only payment authorized was a money payment such as would forever discharge the obligation of the State. None other would be legal or binding on the State, and the promise, if ever made by

the Canal Commissioners, must fall for want of authority or power in them to make it.

It follows, therefore, that if Mr. Wright's predecessor ever had any right to use the waters of the canal, he must have obtained the same through the statutes authorizing the Commissioners or Board of Public Works to lease the surplus waters of the canals.

They are as follows :

"Whenever in the opinion of the Board of Public Works, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the State, over and above the quantity of water which may be required for the purpose of navigation, the said Commissioners may order such surplus water, and the lands granted to, or purchased by the State, for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rent, or otherwise ; as they may deem most beneficial for the interest of the State."

Bates Revised Statutes, Sec. 218–87.

"No hydraulic power, nor right to the use of any water, shall be sold, leased or conveyed, except such as shall accrue from the surplus water of the canal, feeders, or dams, or from the water passing around any lock, after supplying the full quantity necessary for the purpose of navigation."

Bates Revised Statutes, 218–88.

"Every lease, grant or conveyance of water power, shall contain a reservation and condition, that the State, or its authorized agents, may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with, and injuriously affect the navigation of either of the canals, feeders, or streams from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded or remitted to the purchaser or lessee, his heirs or assigns."

Revised Statutes, 218–89.

Construing these sections, the Supreme Court of Ohio declared:

"The right of surplus water and to lease the same for private uses, is an incident of the public use of the canal for purposes of navigation. The canals of the State were authorized, constructed and maintained for public purposes, and not to afford water power, to be leased or sold, for private uses. The latter use is subordinate and the right to the same may be terminated whenever the State, in the exercise of its discretion, abandons or relinquishes the public use."

Elevator Co. v. *Cincinnati*, 30 O. S., 630.

"The abandonment of her public canals by the State creates no liability on her part to respond in damages resulting therefrom to parties holding leases of 'snrplus water,' under the Act of March 23d, 1840, to 'provide

for the protection of the canals of the State of Ohio, regulation of the navigation thereof and the collection of tolls.'"

Hubbard v. *City of Toledo*, 21 O. S., 379, Syl.
Cooper v. *Williams*, 4 O., 253.
Buckingham v. *Smith*, 10 O., 288, 297.
Hubbard v. *City of Toledo*, 21 O. S., 399.
Elevator Co. v. *Cincinnati*, 30 O. S., 630, 646, affirmed in 104 U. S., 783.
Fox v. *Cincinnati*, 33 O. S., 492.
State ex rel., v. *Board of Public Works*, 42 O. S., 615.
Halderman v. *Pa. R. R. Co.*, 50 Pa. St., 440, 441.

"1. Under the provisions of the act of March 23, 1840; (3 Rev. Stat. 417, Sec. 20 to 23 inclusive) relating to the canals of the State, it is the duty as well as the right, of the Board of Public Works, to resume the privilege or right to the use of surplus water, leased or sold for hydraulic purposes, or any portion thereof, whenever, at any time, it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of the canal, feeder or stream from which such water is taken."

"2. The Board of Public Works is not authorized by said statute to in any manner surrender, abridge, restrict or limit its power to resume, at any time, the surplus water leased or sold for hydraulic purposes, whenever it may be deemed necessary for the purposes of navigation; nor to create or impose any burden or obligation upon the State, by reason of the exercise of such right of resumption, other than is authorized by the 23d section of said act."

"3. Hence, a clause providing that on such resumption of surplus water and termination of the lease, the

Board of Public Works shall pay to the lessee the value of the lasting improvements erected for the use of such water, is a restriction on the performance of a public duty, and is unauthorized and void."

State ex rel. Fanger v. *Board Public Works*, Syl. 42 O. S., page 607.

"3d. But if we are in error in this construction of the statute and these words embrace conditions and reservations imposed upon the State, they must be such as relate to the use of the water for hydraulic purposes, which are in the nature of the quantity used, the manner of its use, &c. It is quite clear they are not broad enough to embrace the conditions to be imposed upon the State after the right to use the water has expired, or after the State has abandoned the canal as a public highway. By such resumption or abandonment, which are identical in their results, so far as lessees are concerned (*Hubbard* v. *Toledo*, 21 Ohio St., 379) the State is not liable to respond in damages to the lessee. If it were otherwise the State would be compelled to maintain her canals at any sacrifice for the exclusive benefit of the lessees of surplus water, or become the purchaser of the property of the lessee, thus making the incidental purpose, paramount to the public use."

State ex rel. v. *Board Public Works*, 42 O. S., 615.

The Supreme Court of the United States in construing this statute in a matter brought before it where a party became the owner of a lease made pursuant to the provision in this section, and a statute was subsequently passed whereby the canal within certain limits was granted to and appropriated by a city for a highway, held "that the leesee was not thereby deprived of his property without due process of law, as the State, so far from assuming an obligation to maintain

the canals to supply water power, had the right, of which every lessee was bound to take notice, to discontinue them whenever the Legislature deemed expedient."

Fox v. *Cincinnati*, 104 U. S. Supreme Court, 783.

From this we are justified in claiming that Mr. Wright's predecessor could not, under the statutes of the State, acquire any right to demand water to be furnished him from the canal after the State had determined to cease the use of the canal and could not insist that the State should keep up the canal for his own private use, and that he used the surplus water with the knowledge that the State had the right to discontinue the supply whenever the Legislature deemed it expedient to do so.

No other statute of the State authorized any agent of the State to make any contract with parties along the canal to bind the State in any other manner than as fixed by the statute above quoted.

The statute authorizing the construction of this canal authorized the Canal Commissioners to "take possession of and use all and singular any lands, water, streams and material necessary for the prosecution of the improvements intended by this Act, to make all such canals, dams and other works and devices as they may think proper for making said improvements; doing, nevertheless, no unnecessary damage," and further enacted that, "provided, however, that all such applications to the Board of Canal Commissioners for compensation for any lands, waters, streams and materials so appropriated shall be made within one

year after such lands, waters, streams or materials shall have been taken possession of by said Commissioners for the purposes aforesaid."

23 O. L., page 57, 58.

The statute fixes the limit of powers granted to the Canal Commissioners as contracts about the consideration of the lands and streams taken by the State for canal purposes. It clearly gives to the Commissioners no right to bind the State by a contract to furnish water forever through the canal to this mill, nor does it empower them to bind the State by contract to forever maintain a mill dam. The compensation to be claimed and paid must be claimed within a year from the time of the appropriation, and it is clear from the wording of the Act that such compensation must have been a full and final compensation to be paid or given at the time and not a continuing liability on the State.

We therefore arrive at the conclusion that there was no authority vested in the Canal Commissioners to bind the State to forever maintain this canal for the purpose of furnishing water to the mill of Mr. Wright, nor to bind the State to forever maintain a dam across the Hocking River for the purpose of furnishing water to his mill.

The title to this land passed from Mr. Wright's predecessor to the State in fee simple. It could pass in no other way. Nothing that the State might do with this strip of land over which the canal was constructed and which has been leased to the defendant railroad company, could in any way affect any right

of the plaintiff in error or impair any contract which he has with the State of Ohio. If he has any contract rights with reference to the mill dam, those rights are not connected with the title to this real estate. The State has a right to sell or dispose of the land in any manner it chooses, and such sale or disposition touches upon no right of the plaintiff in error. If the State is under any obligation to maintain this mill dam, the petition does not show that the State has refused to maintain it. For anything that the petition shows, the mill dam is in the best of repair and is fully up to anything that could be claimed under the alleged contract, and the right of the plaintiff in error, if he ever had any, to look to the State to maintain this mill dam hereafter, during all future time, is in no way infringed upon or impaired or interfered with by the lease of title to the land. The State still owns the fee title to this land, subject to the lease to this railroad company, with right of reversion to the State, but Mr. Wright could not have sold this land nor have taken away the possession thereof from the State in order to compel the State to maintain the dam or furnish water through the canal under the alleged contract. There is no connection of any kind between whatever rights the plaintiff in error could have as to the maintenance of the dam and the water supply, and the title to this property, and the statute under which it was acquired would permit no such relation or connection, but would only permit the full and ample fee title to pass to the State. This the State has just as full a right to lease to the defendant in error.

The natural deduction from the foregoing reasoning is that the lease of the lands does not impair any contract which Mr. Wright has with the State of Ohio, and therefore the Act is not repugnant to Section 10, Article 1, of the Constitution of the United States.

II.

Judge DANIELS, in *Butler* v. *Pennsylvania*, draws a clean cut distinction between contracts pertaining to public utilities and those dealing with private matters. We quote from his opinion because of its forcible statement:

"The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed private rights of property are vested. These are clearly distinguishable from measures of engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is a matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to re-appoint them, after the measures which brought them into being shall have been found unless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the

perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult if not impracticable, in this view, either to remodel the organic law of a State, as constitutional ordinances must be of higher authority and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensible for the preservation of the body politic, and for the safety of the individuals of the community. It is true, that this power, or the extent of its exercise, may be controlled by the higher organic law or constitution of the State, as is the case in some instances in the State constitutions, and as is exemplified in the provision of the Federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. The Constitution of Pennsylvania contains no limit upon the discretion of the Legislature, either in the augmentation or diminution of salaries, with the exceptions of those of the Governor, the Judges of the Supreme Court, and the Presidents of the several Courts of Common Pleas.

The salaries of these officers cannot, under that Constitution, be diminished during their continuance in office. Those of all other officers in the State are dependent upon legislative discretion. We have already shown, that the appointment to and the tenure of an office created for the puclic use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term contracts, or, in other words, the vested private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them. This doctrine is in strictest accordance with the rulings of this Court in many instances, from amongst which may be cited its reasoning in the important and leading case of the *Charles River Bridge* v. *The Warren Bridge*, in 11 Peters Reports, and in the case of *The State of Maryland* v. *The Baltimore & Ohio Railroad Company*, in 3 Howard's Reports, to which might be added other decisions upon claims to monopoly, as ferry privileges, in restraint of legislative action for public improvement and accommodation. In illustration of the doctrine here laid down, may also be cited the very elaborate opinion of the Supreme Court of New York in the case of *The People* v. *Morris*, reported in 13 Wendell, 325."

The case at bar is analagous to the above case. There never was any contract between the plaintiff in error on the one hand, and the National and State Governments on the other or on his behalf whereby

"perfect rights, certain definite, fixed, private rights of property are vested" in him. He never was a party to the arrangement between the United States and the State. He had no standing in the matter. The whole subject matter pertained to the public business of the State and not to private benefit. The measures and engagements undertaken by the State in constructing the Hocking Canal were for the benefit of all and were not undertaken with a view of carrying them on after they ceased to be of public utility, that is, after the object of their creation and reason for their existence had ceased. When the public utility of this canal ceased, it ceased to effectuate a public use. "The measures which brought it into being" have been found useless, have been fulfilled. The plaintiff cannot insist upon a perpetuation of a public policy and expense which is useless and can serve no purpose except to the private accommodation of himself alone. It is a notorious fact that the interior canal systems of Ohio and other States have been supplanted and, in large part, made over into railways, with the full approval and tacit consent of the United States Government. Their use has been abandoned by the only parties who are interested in the agreements accompanying their construction. No one else was a party to the arangement. No one else can hinder the parties from abandoning their own contract, and no one's contract rights are thereby impaired.

The principles governing the cases where a State may bind itself by its legislation were first clearly enunciated in the Dartmouth College case. Speaking of

that case, Justice SWAYNE in *Newton* v. *Commissioners*, 100 U. S., 557, said :

"The principle there laid down, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a *public* law relating to a *public subject* within the domain of the *general* legislative power of the State, and involving the *public rights* and *public welfare* of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the Court by the argument in the Dartmouth College case."

In the case of *East Hartford* v. *The Hartford Bridge Co.*, 10 How. 533, the Court said :

" But it is not found necessary for us to decide finally on this first and more doubtful question, as our opinion is clearly in favor of the defendant in error on the other question ; namely, that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject matter of their action, we think that the doings of the Legislature as to this ferry must be considered rather as *public laws* than as contracts. They related to *public interests. They changed as those interests demanded.* The grantees likewise, the towns, being mere organizations for public purposes, were liable to have their public powers, rights and duties modified or abolished at any moment by the Legislature." . . .

"It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies."

So in the case at bar, the legislature of Ohio was acting on the one part and the United States on the other. They were acting in relation to a *public object*, namely, a waterway for the transportation of the person and property of the general public. The *subject matter* of the negotiations between the United States Government and the State of Ohio pertained to *public duties* and not to private contract and are subject to abandonment at the will of the parties to the arrangement without consideration of the inconvenience to private individuals who may have acted upon the presumption that the public use would be perpetually maintained. In dealing with such public matters, a State cannot be bound to make a change in its conduct, nor can it be held to continue and maintain an expensive canal system which has become entirely useless as a public utility, simply because it established and constructed the canals and a private individual had a license to use the surplus water therefrom. As said by the Court in 10 Howard 533:

"It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, as well as supervision over its subordinate public bodies."

The case at bar falls easily within the cases classed in *Newton* v. *Commissioners*, 100 U. S. 559, as dealing

with "governmental subjects" and hence within the category of those cases lying outside of the inhibition of the National Constitution.

III.

In the case of *Armstrong* v. *The Commissioners*, 4 Blackf. (Ind.), 216–217, the statute considered by the Court declared that "so soon as the public buildings shall be completed in the manner aforesaid at the place designated, the same shall be *forever* thereafter the permanent seat of Justice of said County of Dearborn." Private parties had agreed to build the Court House as a condition precedent. They performed the condition. The Court held that "the act did not create a contract." This ruling was approved in *Newton* v. *Commissioners*, (100 U. S., 560).

Bentham says that "All laws may be said to be framed with a view to perpetuity, but perpetual is not synonymous to irrevocable; and the principle on which all laws ought to be, and the greater part of them have been established is, that of defeasible perpetuity—a perpetuity defeasible by an alteration of the circumstances and reasons on which law is founded." As quoted in 24 Howard, 263, 302.

What contract right has or could vest in the plaintiff in error from the agreement between the National and State Government growing out of the donation of the lands to the State by the United States with the proviso for use of the canal by the latter and the acceptance thereof by the State? No right of his, distinct from that of all other citizens was safeguarded thereby. The canal was built for the public at public expense.

The National Government contributed part of the cost for the privilege of using them for transportation—still a public use.

These were the sole provisions. Not a word, not a provision additional. No right reserved for plaintiff in error or any other person. Where is his contract right vesting through this transaction? He has none. What consideration did he give? It is not claimed that he in any way had anything to do with the negotiations or agreement between the two Governments, hence he was not a party thereto, and acquired no rights thereby. No contract exists in his favor.

This Court has said: "But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized and never permitted to extend *either in scope or duration* beyond what the terms of the concession clearly require."

Tucker v. *Ferguson*, 22 Wall., 575.

"It must not be a mere gratuity. There must be a sufficient consideration, or, no matter how long the alleged right has been enjoyed, it may be resumed by the State at its pleasure."

Newton v. *Commissioners*, 100 U. S., 561.
Citing *Christ Church* v. *Philadelphia*, 24 How., 300.

"Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

Fertilizing Co. v. *Hyde Park*, 97 U. S., 666.

In the case at bar, no affirmation is made that the plaintiff in error paid any consideration in the agreement between the two Governments or was a party thereto, or had any part therein. The record is in absolute negation of such position, and hence no right vested in him thereby, and the parties are entitled to abandon the subject matter thereof at their pleasure.

Following from the foregoing, we submit that:

(*a.*) **The title to the strip of land acquired by the State of Ohio from Mr. Wright's predecessor was acquired by fee simple title free from all incumbrances or rights whatever.**

(*b.*) **No contract could have been made by the agents of the State of Ohio binding the State to maintain a mill dam or to furnish water to the mill by way of the canal.**

(*c.*) **Plaintiff in error was not a party or privy to the agreement between the United States and the State of Ohio, and acquired no rights thereunder.**

(*d.*) **If he has any rights they sound in damages, and the Act leasing the canal lands saves them to him by express stipulation.**

(*e.*) **No contract right of plaintiff is impaired, and hence he does not bring his case within the inhibition of the Constitution of the United States.**

(*f.*) **No contract right of any of plaintiffs in error is impaired, and hence none of these causes come within the operation of the Constitution of the United States.**

Respectfully submitted,

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